No. 01-352

Supreme Court, U.S.
FILED
NOV 2001

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

Katie Arsberry, Phyllis Brooks, Jeanne Gammon, Guadalupe Giron, Willie Mae Haggard, Linda Goodman, Carolyn Hawthorne, Susan Hazely, Mary High, Akua Hope, Arlene Johnson, Anthony Maltese, Sandy Markiewicz, Catherine Nystrom, Annie Ross, Jamillah Fields, Brenetta Glass, June Dylla, Elizabeth Stewart, Midwest Center for Justice, Ltd., Lonnie Arsberry, Maya Haggard, John High, John Markiewicz, Rodney Nystrom, Nathson Fields, Chris Brown, John Below, Justin Wilcox, and Mary Weekly, on behalf of themselves and all others similarly situated,

Petitioners,

-against-

State of Illinois, Michael S. Schwarz, Director, Central Management Services, Donald N. Snyder, Director, Illinois Department of Corrections, Cook County, Dupage County, Kane County, Ameritech Services, Inc., AT&T, Invision Telecom, MCI Telecommunications Corporation, and Consolidated Communications Public Services, Inc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners Katie Arsberry, *et al.* respectfully submit this reply brief in further support of their petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in *Arsberry v. State of Illinois*, 244 F.3d 558 (7th Cir. 2001).

ARGUMENT

Petitioners have previously shown that the Seventh Circuit's *Arsberry* decision, holding that inmates have no First Amendment rights to use the telephone, completely confounds this Court's First Amendment jurisprudence, and squarely conflicts with the decisions of all other circuit courts of appeals that have addressed the issue and acknowledged the First Amendment rights of prisoners to speak with their families via the telephone. The Seventh Circuit's reasoning is premised – either implicitly or explicitly – on four "rules" of the court below's own making: (i) that private conversations are generally unworthy of First Amendment protection; (ii) that the First Amendment generally only protects speech on matters of public concern; (iii) that the opportunity to write letters and have visitors extinguishes altogether any First Amendment rights that inmates and their families may have in other means of communication with each other; and (iv) that restrictions on inmate telephone access, no matter how severe and no matter how unrelated to valid penological interests, do not implicate the First Amendment rights of inmates' family members. These "rules" are completely at odds with this Court's First Amendment jurisprudence.

In their opposition to this petition, respondents attempt to transform the critical sentence in the faulty opinion below from the central holding of the case (on inmates' First Amendment rights) into mere dictum. This, however, utterly distorts the critical passages in the *Arsberry* decision. Try as they might, respondents cannot show that the Seventh Circuit did not mean what it plainly said when it stated that inmates have no First Amendment rights to use the telephone.

ARGUMENT

I. THE SEVENTH CIRCUIT SQUARELY HELD THAT INMATES HAVE NO FIRST AMENDMENT RIGHTS TO USE THE TELEPHONE

Respondents urge the Court (at 4) to ignore the Seventh Circuit's remarkable statement that "not to allow [inmates] access to a telephone might be questionable on other grounds, but to suppose that it would infringe the First Amendment would be doctrinaire in the extreme." (A49) That statement, however, cannot be ignored because it is the basis on which the court below rejected petitioners' First Amendment claim. While it is true that the Seventh Circuit ruled that costly inmate telephone service is not actionable under the First Amendment (Resp'ts Br. at 4-5), that ruling rested entirely on the court below's view that inmates have no First Amendment rights to use the telephone. That view is as much a part of the holding in the case as is the ultimate result. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 68 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

Contrary to respondents' assertion (at 5), the Seventh Circuit did not distinguish *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 591 (1983), on the grounds that the "special concerns" present there regarding the political process and differential treatment of the press are lacking in this case. Indeed, the court below never even mentioned those concerns. Rather, the Seventh Circuit found *Minneapolis Star* inapposite because, in the court below's view, the content of inmate telephone calls, unlike the content of newspapers, is very rarely entitled to

First Amendment protection. (A49) To be sure, the Seventh Circuit acknowledged that "the telephone can be used to convey communications that are protected by the First Amendment." (A49) Resp'ts Br. at 5. The court below, however, also stressed -- in the very same sentence -- that "it is extremely rare for inmates and their callers to use the telephone for this purpose." (A49)

Respondents argue (at 6) that the Seventh Circuit's discussion of the motivation underlying the adoption of the inmate telephone system (and commission policy) at issue here necessarily implies the court below's recognition of inmates' First Amendment rights to use the telephone. To the contrary, the Seventh Circuit discussed the issue of motivation for the sole purpose of distinguishing this case from *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), *not* because it assumed that inmates have First Amendment rights to use the telephone. (A48-49) Indeed, in the very next paragraph of its opinion, the Seventh Circuit, as already noted, expressly stated that "it would be doctrinaire in the extreme" to suppose that inmates have such First Amendment rights. (A49)

If the Seventh Circuit had recognized that inmates have First Amendment rights to use the telephone, as respondents argue (at 6), it surely would have proceeded to analyze the constitutionality of the inmate telephone system (and commission policy) under the analysis set forth in *Turner v. Safley*, 482 U.S. 78 (1987), just as respondents purport to do (at 9-12) in their brief to this Court. The court below however, never even mentioned, let alone discussed, *Turner*. The only conclusion that can be drawn from this omission is that the Seventh Circuit decided that inmates have no First Amendment rights to use the telephone. This was

plainly the determinative factor in the court below's decision not to apply the *Turner* analysis.

Finally, it is utterly irrelevant that Respondents did not argue below that inmates have no First Amendment rights to use the telephone. Resp'ts Br. at 6-7. The critical fact is that this is what the Seventh Circuit held.

II. THE SEVENTH CIRCUIT'S DECISION CREATES A SPLIT AMONG THE CIRCUITS

To be sure, every other circuit to consider First Amendment challenges to restrictions on inmate telephone service, in the final analysis, has rejected those specific challenges. Resp'ts Br. at 7-9. In doing so, however, all of these circuits recognized that inmates have some First Amendment rights to use the telephone. *See, e.g., Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) ("prisoners have a First Amendment right to telephone access," subject to reasonable security concerns); *Benzel v. Grammar*, 869 F.2d 1105, 1108 (8th Cir.) ("prison inmates have a [First Amendment] right to use the telephone for communication with relatives and friends," subject to reasonable security concerns), *cert. denied*, 493 U.S. 895 (1989); *Washington v. Reno*, 35 F.3d 1093, 1099-1100 (6th Cir. 1994) (prisoners retain the First Amendment rights to communicate with family and friends" via the telephone). Moreover, these circuits rejected the First Amendment challenges to restrictions on inmate telephone service only after they applied the *Turner* analysis. The Seventh Circuit thus stands alone, and in direct conflict with the great majority of circuits, in refusing to recognize that inmates have First Amendment rights to use the telephone.

Respondents (at 8-9) cite *Israel v. Cohn*, 248 F.3d 1158, 2001 WL 300710 (7th Cir. March 21, 2001) as support for their position that the Seventh Circuit has not created a conflict among the circuits. As Respondents concede (at 9), however, the Seventh Circuit in *Israel v. Cohn* cited approvingly the very language in *Arsberry* that places the Seventh Circuit in direct conflict with other circuits. Moreover, even assuming *arguendo* that the Seventh Circuit's decision in *Israel v. Cohn* implicitly rejects *Arsberry*'s reasoning, that decision is unreported and thus entitled to *no precedential value* under the Seventh Circuit's own rules. 7th Cir. R. 53(b)(4). Finally, the mere fact that a conflict may exist *within* the Seventh Circuit on whether inmates have First Amendment rights to use the telephone does not lessen the conflict *among* its sister circuits on that issue.

III. PETITIONERS HAVE STATED A VALID FIRST AMENDMENT CLAIM

Petitioners have previously shown that the inmate telephone system at issue here is subject to scrutiny, *not* under the deferential *Turner* analysis, but rather under traditional intermediate scrutiny because the system reflects a purely "budgetary" choice that does not implicate prison security, control of inmate behavior, or the internal prison environment and regime. Pet. at 20. Respondents do not even mention, let alone address, this part of petitioners' argument.

Contrary to respondents' assertion (at 10-12), the inmate telephone system at issue here even fails to survive scrutiny even under the deferential *Turner* analysis. Respondents, for example, entirely ignore the commission policy, no doubt because they cannot show a "valid rational

connection" between that policy and legitimate penological objectives. *Turner*, 482 U.S. at 90.

To be sure, inmates generally may send mail to their families, friends, and loved ones on the outside, and vice-versa, and inmates generally may receive visitors during regular or extended visiting hours. Resp'ts Br. at 13. This Court has made clear, however, that the availability of alternative means of communication, though a relevant factor, "does not extinguish altogether" an inmate's "constitutional interest" in other means of communication. *Pell v. Procunier*, 417 U.S. 817, 823-24 (1974). The same can be said of inmates' families, friends, and loved ones. For those of petitioners -- the elderly and ill -- who cannot read or write letters or leave the home, the telephone is the only means of communication with family members, friends, or loved ones in prison. (A18-19). In asserting (at 13) that the availability of letters and visits undermine the First Amendment claims here, respondents entirely fail to address -- as did the court below -- this group of petitioners' claims.[1]

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[1] As petitioners have previously observed (Pet. at 18-19), the inmate telephone system and the commission policy at issue here implicate the First Amendment rights of *both* inmates *and* those whom they call. This Court has made clear that the rights of those on the outside who wish to communicate with inmates are wholly independent and not derivative of an inmate's rights. *See Procunier v. Martinez*, 416 U.S. 396. 409 (1974).

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Dated: New York, New York
November 15, 2001

Respectfully Submitted,

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